YAP HONG TOO & ANOR.

v.

WONG AH MEI & ANOR.

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-745 OF 1993]
1 NOVEMBER 1996

CONTRACT: *Sale and purchase of land - Sale and purchase agreement - Stipulation as to time - Breach - Specific performance - Relief from forfeiture - Whether could be granted by Court of equity in proper circumstances.*

The appellants (the purchasers) had entered into a sale and purchase agreement with the respondents (the vendors) whereby they agreed to buy a piece of land from the latter. The sale was subject to an approval being given by the Court. The purchasers had paid the vendors some earnest money, and by cl. 3 of the agreement undertook to pay the balance purchase price of RM86,256 within seven days of receiving the Court order. Clause 11 made time the essence of the agreement, and cl. 16 stipulates that any notice required to be given under the agreement must be sent to the address as spelt out in the long title of the agreement.

On 4 November 1982 the Court gave the order approving the sale of the land. The vendors, however, did not send the sealed copy of the order to the purchasers at the addresss as stated in the agreement. Instead, on 11 January 1983, the Court order was sent to the purchasers' solicitors, who, upon receipt of the same on 15 January 1983, immediately posted the same to the purchasers. The order was received by the purchasers on 19 January 1983, and 5 days later, on 24 January 1983, the purchasers submitted to the vendors the balance purchase price.

The vendors, alleging breach of cl. 3, refused to accept the payment. In the Court below, in an action *inter alia* for specific performance, the purchasers argued that there was due compliance of cl. 3, as the stipulated 7 days only ran from 19 January 1983, i.e. the actual date they received the Court order. The trial Judge, however, took a different view and ruled that there was a breach of cl. 3. According to the learned Judge, the time of receipt of the order by the purchasers was the time when it was received by their solicitors, i.e. on 15 January 1983, and that being the case, the payment on 24 January

1983 could only come outside the seven day period. An order of forfeiture of the earnest money, was in the result ordered whereupon the purchasers appealed. Before the learned appeal Judges, the issue that arose was whether, on the facts and in the circumstances herein, the Court of equity should intervene as to grant the purchasers relief against forfeiture.

Held:

Per Peh Swee Chin FCJ (delivering the judgment of the Court):

[1] A Court of equity can grant relief against forfeiture when circumstances justify it. Similarly, by extension of the rule, in an action for specific performance, for a purchaser who comes to Court with clean hands, a Court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it.

[2] In the instant case, the justifying circumstances could be found in the conduct of the vendors who sent the Court order to the purchasers's solicitors instead of sending it to the purchasers directly at the address stated in the sale and purchase agreement, as clearly indicated by cl. 3 and cl. 16. If the vendors were not strict in compliance with the said cl. 3, it would be quite inequitable for them to insist on the purchasers complying strictly with cl. 3 as to time.

[3] The actual delay in sending the balance of the purchase price corresponded to more or less, or was caused by the actual delay in the Court order reaching the purchasers. The actual delay in the Court order reaching the purchasers was caused by the indirect transmission of it to the purchasers' solicitors.

[4] The purchasers and their solicitors had been vigilant in doing their respective parts of sending the order and making the payment respectively, and in no way could their conduct be considered reprehensible. Relief should be granted to the purchasers against the forfeiture of the bargain for their failure to comply with cl. 3 as to time by allowing the purchasers to pay the said balance of the purchase price late by two days as they had done.

[Appeal allowed. Order accordingly]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Perjanjian jualbeli - Penetapan berhubung dengan masa Kemungkiran - Pelaksanaan spesifik - Relief daripada perlucutan hak - Samada relief boleh diberikan oleh Mahkamah ekuiti dalam keadaan-keadaan yang wajar.*

Perayu (pembeli) telah memasuki satu perjanjian jual beli dengan responden (penjual) di mana mereka telah bersetuju untuk membeli sebidang tanah daripada pihak yang terkemudian. Penjualan itu adalah tertakluk kepada kelulusan Mahkamah. Pembeli telah membayar kepada penjual satu jumlah wang taruhan, dan melalui fasal 3 perjanjian telah mengakujanji untuk membayar baki harga belian sebanyak RM86,256 dalam tempoh tujuh hari selepas menerima perintah Mahkamah. Fasal 11 menjadikan masa intipati perjanjian, dan fasal 16 menetapkan bahawa apa-apa notis yang perlu diberikan di bawah perjanjian itu mestilah dikirimkan kepada alamat sepertimana yang tertera dalam tajuk panjang perjanjian itu.

Pada 4 November 1982 Mahkamah telah memberikan perintah meluluskan penjualan tanah itu. Penjual, namun begitu, telah tidak mengirimkan salinan perintah yang telah dimeterai kepada pembeli di alamat yang dirujuk dalam perjanjian. Sebaliknya, pada 11 Januari 1983, perintah Mahkamah itu telah dikirimkan kepada Peguamcara pembeli, yang, setelah menerimanya pada 15 Januari 1983, terus mengirimkannya kepada pembeli. Perintah itu telah diterima oleh pembeli pada 19 Januari 1983, dan lima hari kemudiannya, pada 24 Januari 1983, pembeli telah mengemukakan kepada penjual baki harga belian.

Penjual, yang mendakwa kemungkiran fasal 3, enggan untuk menerima pembayaran yang dikemukakan. Dalam Mahkamah di bawah, berikut satu tindakan untuk mendapatkan antara lainnya perlaksanaan spesifik, pembeli telah berhujah bahawa fasal 3 telah dipatuhi sepenuhnya, kerana tempoh tujuh hari yang ditetapkan hanya bermula daripada 19 Januari 1983, iaitu tarikh sebenar mereka menerima perintah Mahkamah itu. Hakim perbicaraan, namun begitu, mempunyai pendapat yang berlainan dan telah memutuskan bahawa terdapat kemungkiran terhadap fasal 3. Menurut Hakim yang bijaksana, masa penerimaan perintah oleh pembeli adalah masa bilamana ianya telah diterima oleh Peguamcara mereka, iaitu pada 15 Januari 1983, dan oleh hal yang demikian, pembayaran pada 24 Januari 1983 adalah di luar tempoh tujuh hari itu. Akibatnya satu perintah perlucutan hak terhadap wang taruhan telah diperintahkan, selepas mana pembeli telah merayu. Di hadapan Hakim-Hakim rayuan yang bijaksana, isu yang berbangkit adalah samada, berdasarkan fakta-fakta dan dalam keadaan-keadaan di sini, Mahkamah ekuiti seharusnya mencelah bagi memberikan pembeli relief terhadap perlucutan hak.

Diputuskan:

Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):

[1] Mahkamah ekuti boleh memberikan relief terhadap perlucutan hak apabila keadaan-keadaan mewajarkannya. Begitu juga, dengan melanjutkan kaedah, dalam sesuatu tindakan untuk perlaksanaan spesifik, bagi seorang pembeli

yang tiba ke Mahkamah dengan tangan yang bersih, sesebuah Mahkamah ekuiti boleh melepaskan pembeli itu terhadap kegagalan untuk mematuhi syarat berhubung dengan masa dalam perjanjian jualbeli di mana keadaan-keadaan mewajarkannya.

[2] Dalam kes semasa, keadaan-keadaan yang mewajarkan pemberian relief boleh didapati dalam kelakuan penjual yang telah mengirimkan perintah Mahkamah kepada Peguamcara pembeli dan tidak terus kepada pembeli pada alamat yang dinyatakan dalam perjanjian jualbeli itu, sepertimana yang dinyatakan dengan jelasnya oleh fasal 3 dan fasal 16. Jika penjual tidak tegas dalam mematuhi fasal 3, ianya agak tidak saksama bagi mereka untuk menggesa pembeli supaya mematuhi fasal 3 secara tegas berhubung dengan masa.

[3] Kelewatan yang sebenar dalam menyampaikan baki harga belian lebih kurang sama dengan, atau telah disebabkan oleh kelewatan sebenar perintah Mahkamah sampai kepada pembeli. Kelewatan sebenar dalam Mahkamah perintah itu sampai ke pembeli adalah disebabkan oleh pengiriman secara tidak langsung perintah itu kepada peguamcara pembeli.

[4] Pembeli dan Peguamcara mereka telah berhati-hati dalam memainkan peranan mereka masing-masingnya untuk mengirimkan perintah itu dan membuat pembayaran, dan tidak mungkin kelakuan mereka boleh dianggap tidak wajar. Relief seharusnya diberikan kepada pembeli supaya tidak dilucutkan hak berhubung persetujuan mereka di sini kerana kegagalan mereka untuk mematuhi fasal 3 berhubung dengan masa, dengan membenarkan pembeli membayar baki harga belian tersebut lewat dua hari sepertimana yang telah mereka lakukan.

[Rayuan dibenarkan. Perintah sekadarnya.]

Case referred to:
Hughes v. Metropolitan Rly Company [1877] 2 AC 439

Other source referred to:
Cheshire, Fifoot & Furmston's Law of Contract, Prof. Furmston, 11th Edn., p. 609

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: F125 of 1983]

For the appellant - R.R Sethu (Yap Bell Pung with him); M/s. Bell & Lee
For the respondent - B.E Teh; M/s. Teh & Assocs.

JUDGMENT

Peh Swee Chin FCJ:

We have earlier allowed the appeal of the appellants, setting aside the order of the Court below dated 28 December 1993 and granting specific performance with consequential directions, with costs here and below. We indicated that we would give our grounds of judgment and we hereby do so now.

The appellants (hereinafter called the purchasers) and the respondents (hereinafter called the vendors) entered into a sale and purchase agreement dated 28 December 1979 in respect of a piece of land, and relevant for the purpose of this appeal are cls. 3, 11 and 16 thereof which are set out below:

> 3. The purchaser shall deposit the balance of the purchase price amounting to Ringgit Eighty-Six Thousand Two Hundred and Fifty Six (RM86,256) with the vendors' solicitors Dr. Stephen Goh & Partners, Advocates & Solicitors of 6th Floor, Pudu Building, Pudu Road, Kuala Lumpur as stakeholders (hereinafter called 'the vendors' solicitors') within seven (7) days of receipt of the Order of Court approving the sale of the said land.
>
> 11. Time wherever mentioned shall be deemed to be of the essence of this agreement.
>
> 16. Any notices required to be given under the provisions of this agreement shall be deemed to have been sufficiently served on the other party if such notice is left at the usual or last known place of residence or at the address abovestated or sent by registered letter to any such address and in the last mentioned case the service shall be deemed to be effected at the time when the registered letter would in the ordinary course of post be delivered.

It is to be noted that the vendors signed the said agreement as administrators of the estate of the registered proprietor of the land since deceased and this has reference to the "Order of Court" approving the sale of the said land as mentioned in the said cl. 3.

The statement of claim of the purchasers sets out the material facts of this case which we will mention or summarise later. It also refers to cls. 3, 11 and 16 of the said agreement set out above, in particular, by para. 4(i) of the statement of claim, it states:

> 4(i) The address of the plaintiffs was stated in the long title of the said agreement as "No. 2, Jalan Merak, Off Jalan Ipoh, Kuala Lumpur". That address was the address referred to as "the address abovestated" in the said cl. 16 as the address of the plaintiffs.

In this connection, para. 15 would be relevant and is set out below:

> Para 15. Neither the defendants nor their solicitors sent the sealed copy of the said Court Order dated 4 November 1982 to any of the addresses of the plaintiffs envisaged in cl. 16 of the said agreement dated 28 December 1979. If time had continued to be of the essence of the agreement contrary to the denial thereof in para. 14 above the plaintiffs plead that the seven days stipulated in cl. 3 of the said agreement commenced running from the actual date on which the plaintiffs received the said sealed copy of the order of the Court. The plaintiffs actually received the sealed copy of the said order of the Court on 19 January 1983. There was no variation of the said cl. 16. No antecedent authority was conferred by the plaintiffs on Syarikat Tan Ah Lak either (a) to receive the Court order so as to vary cl. 16 or cl. 3 of the said agreement so as to make a receipt of the Court order by Syarikat Tan Ah Lak into a simultaneous receipt by the plaintiffs of the Court order, or (b) to receive the Court order.

We now set out the material and undisputed facts. A deposit or earnest money was paid and by cl. 3 aforesaid, the balance of the purchase price in the sum of RM97,038 (increased apparently by consent of both parties from RM86,256 mentioned in the same cl. 3) was to be paid "within seven (7) days of receipt of the order of Court approving the sale of the said land", bearing in mind that time would be of the essence in this connection.

The said agreement was signed on 28 December 1979 and the Court order granting leave to sell the said land was obtained on 4 November 1982. By this, the vendors had changed their solicitors, and the new solicitors were M/s. Cheang Lee & Ong of Ipoh in place of Dr. Stephen Goh & Partners, Kuala Lumpur.

M/s. Cheang Lee & Ong sent, on 11 January 1983, the order of the Court dated 4 November 1982 to M/s. Tan Ah Lak, solicitors for the purchasers and M/s. Tan Ah Lak received it on 15 January 1983. On the same day they received the Court order, M/s. Tan Ah Lak sent it on 15 January 1983 to the purchasers who received it on 19 January 1983.

On the instructions of the purchasers, M/s. Tan Ah Lak sent the balance of the purchase price on 24 January 1983, by hand, this time, to M/s. Cheang Lee & Ong who received it with the covering letter on 24 January 1983.

By letter dated 31 January 1983 M/s. Cheang Lee & Ong wrote to M/s. Tan Ah Lak as follows:

> We regret to inform you that our client cannot now accept payment from your client as your client is in breach of para. three (3) of the sale and purchase agreement. In the circumstances, we hereby enclose the cheque.

The Court below was of the view that there was a breach of cl. 3 of the sale and purchase agreement in view of time being made the essence of contract, because the time of receipt of the order of the Court by the purchasers would be time when it was received by their solicitors, *viz.* M/s. Tan Ah Lak on 15 January 1983 and payment of the balance of the purchase price on 24 January 1983 was outside the seven day's period mentioned in the said cl. 3, i.e. 2 days late.

It was the contention of the purchasers that they actually received the Court order on 19 January 1983, and therefore they paid on 24 January 1983, the balance of the purchase price within time, i.e. within the seven day's period. This contention was rejected by the learned trial Judge.

A Court of equity can grant relief against forfeiture when circumstances justify it. Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to Court with clean hands, a Court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it. In the instant case, such circumstances could be found in the conduct of the vendors who sent the Court order in question to M/s. Tan Ah Lak instead of sending it to the purchasers directly at the address stated in the sale and purchase agreement, as clearly indicated by cl. 3 and cl. 16. If the vendors were not strict in compliance with the said cl. 3, it would be quite inequitable for them to insist on the purchasers complying strictly also with cl. 3 as to time. The actual delay in sending the balance of the purchase price corresponded to more or less, or was caused by the actual delay in the Court order reaching the purchasers. The actual delay in the Court order reaching the purchasers was caused by the indirect transmission of it to the purchasers' solicitors and not to the purchasers directly at the address stated in the sale and purchase agreement, notwithstanding the fact that the transmission to the purchasers' solicitors would be imputed to the purchasers as principals because of the correspondence between the parties hitherto conducted by their respective solicitors. The purchasers and their solicitors had been vigilant in doing their respective parts of sending the order and making the payment respectively, and in no way could their conduct be considered reprehensible. See *Hughes v. Metropolitan Rly Company* [1877] 2 AC 439.

We find an echo in a relevant passage in *Cheshire, Fifoot & Furmston's Law of Contract,* 11th Edn. by Prof. Furmston at p. 609 as set out below:

> It is clear at least that equity, where warranted by the circumstances, will relieve the buyer to the extent of giving him further time within which to complete the contract, even though the parties have agreed that time shall be essential. In other words, the forfeiture will be suspended, provided that the buyer expresses himself ready and willing to pay the balance of the price within the extended time fixed by the Court.

This Court was of the view that relief should be granted to the purchasers against the forfeiture of their bargain for their failure to comply with cl. 3 as to time by allowing the purchasers to pay the said balance of the purchase price late by two days as they had done.

We therefore allowed the appeal as stated above.

Reported by W.A. Sharif